seem to be that, where the notice is cancelled with the consent of both parties before the date set for its expiration, a new tenancy is not necessarily created.

NEGLIGENCE—RES IPSA LOQUITUR.—D laundry company was the lessee of P's premises, which were damaged by an explosion of the laundry boiler. D casualty company had inspected the boiler and issued a contract of insurance thereon to the laundry company. In an action against both it was *held,* the doctrine of *res ipsa loquitur* applied to the laundry company, which was in exclusive control of the boiler, but did not apply to the casualty company because it was not in control. *Kleinman* v. *Banner Laundry Company et al.* (Minn., 1921), 186 N. W. 123.

The fact that the Minnesota court applied the doctrine of *res ipsa loquitur* to a boiler explosion is of no particular importance in view of the same holding in an earlier case. *Fay* v. *Davidson,* 13 Minn. 523. For a collection of cases indicating that the modern tendency is to the contrary, see note in 113 Am. St. R. 986. The interesting point is the distinction made between the laundry company and the casualty company. The report does not indicate upon what theory the casualty company was joined in the action. It may have been for its own possible negligence in inspection, etc. *Van Winkle* v. *American Steam Boiler Co.,* 52 N. J. L. 240. If such was the case, the distinction appears to be sound. No inference of negligence can logically be drawn against it from the mere fact that the boiler exploded while in the exclusive control of another. Application of the doctrine would result in a finding of negligence, but would not determine whose negligence it was. However, the casualty company may have been joined as the real party in interest by virtue of the contract of insurance, the terms of which do not appear in the report. If this was the case, and the casualty company was liable for the negligence of the assured, the distinction which the court makes would appear to be erroneous. Although the cases are replete with declarations that the doctrine of *res ipsa loquitur* has no application unless the defendant was in exclusive control, yet in all these cases, so far as has been found, the negligence sought to be inferred was the negligence of the defendant. *McGillivray* v. *Grt. North. Ry. Co.,* 138 Minn. 278; *Transportation Co.* v. *Downer,* 11 Wall. (U. S.) 129; *Scott* v. *Dock Co.,* 3 Hurl. & C. 596. No case has been found in which the question has been squarely raised, but it is submitted that the doctrine is applicable on principle against anyone who is liable for the negligence of another if it would be applicable against that other.

SALES—RIGHTS OF THIRD PARTIES UNDER WARRANTIES.—In a suit by the vendee against the vendor for failure of vendor's warranty of title the court said by way of *dictum:* "Warranties of chattels are available only between the parties to the contract and not in favor of third parties." *Crocker* v. *Barron* (Mo., 1921), 234 S. W. 1032.

This statement has been generally held to express the law. 14 MICH. L. REV. 264; WILLISTON, CONTRACTS, § 998; WILLISTON, SALES, § 244; *Talley*

v. *Beever and Hindes,* 33 Tex. Civ. App. 675; *Carter* v. *Harden,* 78 Me. 528; *Smith* v. *Williams,* 117 Ga. 782; *Hood* v. *Warren* (Ala., 1921), 87 So. 524. However, some courts express a willingness to abandon the older view where the subvendee sues on a warranty of food. In *Chysky* v. *Drake Bros. Co.,* 182 N. Y. S. 459, where the plaintiff sued for injuries resulting from a mouth infection caused by a wire contained in a cake of the defendant's manufacture which the plaintiff had purchased through a retailer, the court said: "* * * I am of the opinion that the implied warranty of the defendant of the fitness of the cake for human consumption extended to the ultimate consumer of the cake * * * and that the implied warranty inured to the benefit and protection of the plaintiff, although there was no direct contractual relation between the plaintiff and the manufacturer of the cake." Statements to the same effect are found in the following: *Tomlinson* v. *Armour,* 75 N. J. L. 748 (diseased meat); *Parks* v. *C. C. Yost Pie Co.,* 93 Kan. 334 (decayed pie); *Catani* v. *Swift & Co.,* 251 Pa. 52 (trichinae in meat); *Ward* v. *Morehead City Sea Food Co.,* 171 N. C. 33 (decayed mullets); *Davis* v. *Van Camp Packing Co.* (Ia., 1920), 176 N. W. 382 (diseased meat in baked beans). But when we analyze these cases we find only *Catani* v. *Swift & Co., supra,* holding that the implied warranty makes the manufacturer absolutely liable without regard to negligence. Even in that case the court relies on cases decided upon tort liability. In all the other cases above cited the element of negligence was possibly present, so that we cannot say the courts' decisions were not influenced thereby. In effect, then, these cases may go no further than the negligence doctrine of *Thomas* v. *Winchester,* 6 N. Y. 397, where the manufacturer was held liable to the third party consumer. See also 18 MICH. L. REV. 436. Public policy, however, may justify the extension of the manufacturer's liability upon the implied warranty in food cases.

TRIAL—INSTRUCTION ON A LOWER DEGREE OF CRIME WHEN THERE IS NO EVIDENCE THEREOF IS REVERSIBLE ERROR.—The defendant was indicted for murder and was convicted of involuntary manslaughter. The defendant moved for a new trial on the ground that it was error for the court to submit the issue of involuntary manslaughter when there was no evidence whatever to indicate that the killing was unintentional. *Held,* reversible error. *State* v. *Pruett* (N. M., 1921), 203 Pac. 840.

Whether or not an instruction on a lower degree of crime, when there is no evidence thereof, is reversible error is in conflict. The majority of cases hold that such an instruction is reversible error. *Jordan* v. *State,* 117 Ga. 405; *Dichens* v. *People,* 67 Colo. 409; *People* v. *Huntington,* 138 Cal. 261. The theory upon which these cases proceed is that an instruction should be based upon the evidence. Otherwise there would be the anomaly of a man convicted and punished for an offense which the evidence totally fails to show was ever committed by him. The minority of courts, however, hold that such an instruction is one of which the defendant cannot complain. *State* v. *Quick,* 150 N. C. 820; *Bennett* v. *State,* 95 Ark. 100. In the last